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Comment on Recent Cases

ACTION FOR WRONGFUL DEATH: ABATEMENT OF ACTION UPON DEATH OF WRONGDOER AND OF BENEFICIARY.—At common law he who killed another, either wilfully or through his negligent conduct, incurred no civil liability.¹ This may be regarded as an arbitrary extension of the rule, *actio personalis moritur cum persona*.² At a time when compensation rather than punishment had become the principal element in the measure of damages in torts generally, Lord Campbell's Act, passed in 1846, gave a right of action against the wrongdoer for the wrongful death of the injured person in favor of the deceased's relatives.³ Similar statutes have been passed in most of our states.⁴

Although these statutes are by some courts regarded as giving the quality of survivability to any action the deceased might have had, the weight of authority regards them as creating a new and independent right of action in favor of the beneficiaries designated by the statute.⁵ This is so held with respect to the law of California,⁶ which under the Code of Civil Procedure, section 377, gives the right of action to the heirs of the deceased to be enforced either by the heirs or the personal representative of the deceased as statutory trustee of the heirs.⁷ This view seems consistent with the remedial purpose of the statute. Applications of the prevailing theory are found in the rules excluding evidence of the deceased's mental and physical suffering, as well as that of the heirs,⁸ in estimating damage, and in the rule that the amount recovered is not part of the deceased's estate.⁹ Thus the action is purely for the benefit of the next of kin, as compensation for their injury incurred from such death.

From the nature of the action it would seem that the Supreme Court of California was correct in its conclusion in *Clark v. Good-*

¹ *Baker v. Bolton* (1808), 1 Camp. 493; *Kramer v. Market St. Ry.* (1864), 25 Cal. 435.

² Pollock, Torts (9th ed.) 64. For the origin and history of this rule see Goudy, Two Ancient Brocards, in *Oxford Legal Essays*, p. 216.

³ 9 & 10 Vict. ch. 93.

⁴ See table of statutes, Tiffany, *Death by Wrongful Act*, 2nd ed. p. xx.

⁵ *Mich. Cent. R. R. v. Vreeland* (1912), 227 U. S. 59, 33 Sup. Ct. Rep. 192; *Hegerich v. Keddle* (1885), 99 N. Y. 258, 1 N. E. 787.

⁶ *Munro v. Dredging Co.* (1890), 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

⁷ *Hartigan v. S. P.* (1890), 86 Cal. 142, 24 Pac. 851.

⁸ *Simoneau v. Pac. Elec. Co.* (1911), 159 Cal. 494, 115 Pac. 320; *Morgan v. S. P.* (1892), 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71.

⁹ *Jones v. Leonardt* (1909), 10 Cal. App. 284, 101 Pac. 811.

win. It was here held that such an action did not survive the death of the wrongdoer.¹⁰ The court merely applied the old common law maxim, *actio personalis moritur cum persona*, which, although abolished by some states, is still in force in California with certain modifications. According to the Code of Civil Procedure, only those actions survive which are founded on contract, or on tort for injuries either to real property or goods and chattels of the deceased.¹¹ The action for wrongful death clearly is founded on tort, and is not such an injury as survives under the express language of the code. The principal case is in accord with the weight of authority.¹²

When the beneficiary dies, subsequent to the death of the injured party, it would seem that the court would reach the same result and hold that the action died with the beneficiary. However, this particular point has not as yet been passed on by our courts. The injury does not come within the language of the code sections even though the injury were regarded as one to the property which the beneficiary has in the deceased's life.¹³ The courts probably would not adopt this latter view. The argument, that upon the death of the beneficiaries those next in order should receive the benefit, seems untenable as entirely inconsistent with the theory and purpose of the statute, for our courts have consistently held that the right of action accrues to and vests in the beneficiaries at the time of the injured person's death.¹⁴ Consequently what persons are beneficiaries under the statute is determined once and only once, namely upon the death of the injured person.¹⁵ It appears, therefore, that this statutory action for wrongful death does not survive either the death of the wrongdoer, or that of the beneficiary.

R. C. F.

BILLS AND NOTES: NOTICE TO INDORSEE FROM PRIOR DEALINGS. The rule is now well established in England, and the majority of American jurisdictions, that nothing short of actual knowledge of infirmities in negotiable paper, or bad faith in the purchase thereof, will prevent an indorsee from recovering against the maker, notwithstanding any defenses which the latter may have had against

¹⁰ (June 29, 1915), 50 Cal. Dec. 45. The two grounds upon which the court rested the decision were, that the quality of survivability did not attach to the cause of action, and that section 377 of the Cal. Code Civ. Proc. by its express terms gave a right only against the wrongdoer.

¹¹ Cal. Code Civ. Proc. §§ 1582, 1583, 1584.

¹² *Billingsly v. St. Louis R. R. Co.* (1907), 84 Ark. 617, 107 S. W. 173; *supra* note 5.

¹³ *Basler v. Sac. Ry.* (1913), 166 Cal. '33, 134 Pac. 993; 2 *California Law Review*, 160. But see *Meekin v. Brooklyn Heights R. R.* (1900), 164 N. Y. 145, 58 N. E. 50.

¹⁴ *Redfield v. Oakland Cons. R. R.* (1895), 110 Cal. 277, 290, 42 Pac. 822.

¹⁵ *Hammond v. Lewiston R. R.* (1909), 106 Me. 209, 76 Atl. 672.